

THE STATE
versus
JEFREY NYANGU

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 21 May 2020

Criminal review

ZHOU J: The record in this matter was placed before me for review in terms of s 57 of the Magistrates Court Act [*Chapter 7:10*]. The accused was charged with six (6) counts of contravening s 114 (2) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (“stock theft”). The allegations against him are detailed in the charge sheet and the outline of the state case. In respect of count one, the allegations are that on a date to the prosecutor unknown but in the month of November 2017 and at Chiringa Village Chief Nyakuchena Mudzi, the accused took one hornless brown heifer, the property of Stephen Zvamarakare unlawfully as detailed. In count two the allegation is that the accused stole a heifer belonging to the complainant, Jimu Kugara, between 26 and 27 December 2017. In count three the allegations are that in the month of February 2018 the accused stole a heifer belonging to Tinashe Kugara. Count four pertains to an alleged theft of a heifer belonging to Knowledge Kuseri. Count five relates to an alleged theft of a heifer belonging to Sandirai Tembo during the month of May 2018. Lastly, the allegations in count six are that in January 2018 the accused person stole one black steer belonging to Jimu Kugara.

The accused pleaded not guilty to all the charges. He elected to remain silent and not to testify. The magistrate in his judgment records that the accused disputed all the allegations. He was, however, convicted following a trial. After finding that there were no special circumstances which had been shown to exist the court imposed a sentence of 24 years imprisonment on the basis that all counts were being treated as one for sentence.

The State relied on the evidence of one witness, Benson Sibanda (But he is referred to as “Bongani Sibanda” in the judgment of the Magistrates Court), who was the investigating officer.

The evidence and the conclusion reached thereon are summarized in the judgment of the learned magistrate as follows:

“He (Benson Sibanda) told court that they had gathered evidence to the effect that accused had stolen the 6 bovine beasts belonging to the 6 complainants and sold them. They had carried out investigations and made recoveries of all the bovine beasts and the different people to whom accused had sold the beasts who testified (*sic*) to the effect that they had bought them from the accused. The witness indicated that accused had admitted to the 6 counts freely and voluntarily.

During defence case accused maintained his silence. Despite being given the opportunity to cross examine the witness accused did not use that opportunity to protest of (*sic*) his innocence.

As highlighted earlier accused has character traits of a callous and hellacious individual. From evidence presented all implicated him to (*sic*) the commission of the offence.

All the bovine beasts were recovered through the indications of the state witnesses. The buyers implicated accused. Accused did not deny the incriminating evidence.

Hence the state has proven its case beyond any reasonable doubt regarding all the 6 bovines.”

The rest of the judgment before the above passage deals with historical events unconnected to the evidence tendered before the court.

In his evidence in court the only state witness gave no evidence of what beasts were recovered. His brief evidence was that the accused was brought to the police station by an officer by the name Hwata on 26 July and that “on 27 same month accused led us where he sold beast. He identified where he stole. Other counts unfolded during the recovery.”

In all the six counts the complainants did not report the cattle as having stolen to the police. Also, in all the counts the beasts are alleged to have been sold to some persons. Neither the complainants nor the persons to whom the beasts are alleged to have been sold were called to testify. The investigating officer’s evidence was largely hearsay and lacked detail. During his evidence-in-chief the witness was asked why he said that the accused committed the offence. His response was: “He should not waste the court’s time.” He was asked if there was anything linking the accused to the offence. His reply was: “Accused is not only a danger to himself but to society. There was a day matter was scheduled for trial at 14.15 hours accused sneaked from court and went to Mozambique. He was arrested on another matter. At one time he stole a docket.” None of these statements proves the allegations against the accused person.

The onus was on the state to prove beyond reasonable doubt that the accused committed the offences alleged. This standard of proof has been stated in numerous cases. In the case of *S v van Der Meyden* 1999 (1) SACR 447(W) at 448F-G, NUGENT J expressed it as follows:

“The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent ... These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives...”

In this case there were no complaints made to the police regarding the alleged theft. This raises questions as to what triggered the investigation. More significantly, the alleged complainants did not give evidence regarding the allegations of theft. It is inconceivable how the learned Magistrate came to the conclusion that the cattle described in the charge sheet and outline of the state case had been stolen by alleged complainants in the absence of any evidence from those complainants. Equally, none of the persons to whom the accused is alleged to have sold the cattle in question testified. These very serious deficiencies in the state case are very apparent. The investigating officer’s evidence proves nothing. His responses to the questions regarding how the accused person was linked to the offences alleged show a thorough lack of seriousness. He simply did not answer the questions which he was asked. There is reference in the evidence of Benson Sibanda to confessions made by the accused person. Details of the alleged confessions and the circumstances thereof are not given. The warned and cautioned statement was not produced to support the alleged confessions.

The investigating officer who gave evidence referred to indications made by the accused person. However, no evidence of such indications was tendered. Such evidence is certainly not on record.

The magistrate appears to have been concerned about the character of the accused person more than the serious allegations which the accused was facing and the evidence which was tendered to prove these allegations. The continued reference to how the accused had tried to frustrate the trial and repeated characterization of the accused person as a “callous and hellacious individual” blinded the magistrate, and he abdicated his judicial role and convicted the accused person on the basis of non-existent evidence. Judicial officers must not be emotional about matters before them but must be impersonal, objective and fair at all times and make a decision based on evidence, the facts proved and the law.

In this case the accused's guilt was not proved. He is entitled to his acquittal.

In the result, IT IS ORDERED THAT:

1. The judgment of the Magistrates Court, Mutoko (per Mtetwa T. W. Esq.) given on 12 September 2019 in terms of which the accused was convicted of contravening s 114(2)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (6 counts) and sentenced to 24 years imprisonment be and is hereby set aside, and the following is substituted:

“The accused is found not guilty and acquitted.”

2. The accused is entitled to immediate release from prison.

ZHOU J.

MUNANGATI-MANONGWA J agrees